

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

MAXIMUM SECURITY NYC, INC.,

Case No.: 29-RC-192894

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW

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EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, MAXIMUM SECURITY NYC, INC. ("Maximum Security", "Maximum", or "the Employer") requests that the National Labor Relations Board review the Regional Director's Decision and Direction of Election dated April 19, 2017 in the above captioned matter.

THE PETITION

On February 13, 2017, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ ("SEIU 32BJ") filed a petition under Section 9(c) of the National Labor Relations Act ("the Act") seeking to represent a unit of employees including all full-time and regular part-time building service employees working at The Plex residential building located at 301 Sullivan Place, Brooklyn, New York ("The Plex"), but excluding all guards and supervisors as defined in Section 2(11) in the Act.

THE HEARING

An initial hearing in this matter was held on February 23, 2017, in Brooklyn, New York before Hearing Officer Brady Francisco Fitz-Maurice, at which the Employer was precluded from litigating the issue of whether employees in the petitioned-for unit are guards within the meaning of Section 9(b)(3) of the Act. Subsequently, the Regional Director reconsidered its position and scheduled a second hearing, which was held on March 23, 2017 before Hearing Officer Emily Cabrera, at which the parties presented evidence on whether or not the employees are statutory guards.

DESCRIPTION OF THE EMPLOYER'S OPERATIONS

Maximum is a New York State licensed Security Investigation Services Company that employs Security Officers licensed by the State of New York to provide security services. In 2014, Maximum Security entered into a service contract ("Service Agreement") with Halcyon Management ("Halcyon") to provide around-the-clock security services at The Plex. (E-2). Qualified licensed Maximum Security Officers are stationed at The Plex security desk, where they perform security work, including monitor cameras which record areas around the building.

The Plex also employs a porter and a handyman to perform the general building and maintenance services, such as repairs. (E-3). Maximum's license Security Officers do not perform any repairs. (Tr. 280). Though the maintenance personal are instructed to notify the licensed Security Officers if there is a potential security issue, the licensed Security Officers do not give any orders to the maintenance personnel. (Tr.167).

THE EMPLOYER'S BARGAINING UNIT POSITION

At the hearing, the Employer maintained that it only employs licensed Security Officers, who are statutory guards within the meaning of Section 9(b)(3) National Labor Relations Act ("the Act"), and because SEIU 32BJ represents employees who are not considered statutory guards the petition must be denied pursuant to Section 9(b)(3) of the Act.

THE REGIONAL DIRECTOR'S DECISION

On April 19, 2017, Kathy Drew-King, Regional Director, Region 29, held that:

the employees in the petitioned-for unit were hired to provide tenant services¹ at The Plex. The minor guard functions they may serve are incidental to their

¹ This term, "tenant services", was never defined in the decision.

primary service work. Accordingly, I find that they are not statutory guards and will direct an election in the appropriate unit.

In reaching this conclusion, the Regional Director ignored the admissions of individuals and unrefuted evidence, which clearly establish that employees are guards within the meaning of Section 9(b) of the Act.

REQUEST FOR REVIEW

The Employer respectfully requests the Board to review the Regional Director's decision on the grounds that:

1. The Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer; and
2. The decision raises a substantial question of law and policy because of an absence of officially reported Board precedent.

POINT 1

THE REGIONAL DIRECTOR'S DETERMINATION THAT LICENSED SECURITY OFFICERS ARE NOT GUARDS IS CLEARLY ERRONEOUS, NOT SUPPORTED BY THE FACTUAL RECORD, AND WARRANTS BOARD REVIEW.

In rendering this decision, the Regional Director relied upon irrelevant and unsubstantiated testimony, and placed great importance on insignificant details, while simultaneously turning a blind eye to a multitude of facts and admissions, included documentary evidence, that proves employees in the petitioned-for unit are guards within the meaning of Section 9(b)(3) of the Act. The decision trivializes the Service Agreement within which the Employer contracted to provide the licensed Security Officers' services in question, their stated duties and responsibilities, and admissions made by the licensed Security Officers.

A. Under the contract, the employees must be licensed as security guards by New York State.

Pursuant to the Service Agreement, Maximum Security Officers assigned to the Plex must be certified by the New York State Department of State Division of Licensing Services and deemed by the State and its qualifying agencies as qualified to work as security guards. (E-2). By the Service Agreement, Maximum contracts to ensure that Security Officers employed at The Plex pass all job prerequisites of New York State licensed security guards, including a background check and a criminal investigation. (E-2). Failure to comply is a breach warranting termination of the Service Agreement. Nevertheless, the Regional Director essentially disregards the Service Agreement and, worse, dismisses Maximum's contractual duties and obligations therein.

Obtaining a State license is not cosmetic. Candidates must invest resources, including time and money, to complete twenty-four hours of coursework approved by the State. (Tr. 178). In the initial eight hour class, candidates learn the proper techniques to perform security services. (Tr.

176-77). For example they learn about patrols; dealing with emergencies; evacuations; ensuring the safety and security of property and individuals; detecting suspicious packages; and completing proper paperwork.

At the completion of the initial class, an individual must take and pass the test approved by the State of New York. (Tr. 85). Upon passing the test, the individual receives a conditional license and must take a second class of sixteen hours. (Tr. 85-6). Once the second class is completed, the individual takes another test and upon passing the second test is issued a security guard license with the State of New York (E-1A – 1D). It is a learned profession and each security guard must take an eight hour class annually as a requirement to maintain their State license. (Tr. 191).

In her Decision and Direction of Election, the Regional Director noted that the employees are licensed by the State of New York, but found that factor to not be dispositive absent evidence that they perform a security function. Again, as discussed herein, the decision disregards admissions by the licensed Security Officers, as well as observations by the residents. In reaching this decision, the Regional Director blatantly ignored, what the Service Agreement makes plainly clear; the Maximum Security Officers are not incidentally licensed, rather Security Officers employed at The Plex are required to be New York State licensed security guards, trained in a variety of security services, because they are employed as guards. With Maximum being contractually obligated under the Service Agreement to only employ New York State licensed security guards at The Plex, Halcyon assured that the Security Officers are adequately trained, and retrained annually, to provide security services at The Plex.

By itself, the Service Agreement is conclusive evidence of the licensed Security Officers statutory guard status.

B. The licensed Security Officers' duties and responsibilities are those of guards within the meaning of the Act.

In addition to ignoring the requirement that Security Officers be licensed by New York State, the Regional Director disregarded record evidence, pertaining to the licensed Security Officers' duties and responsibilities, which shows that they are employed as guards within the meaning of Section 9(b)(3) of the Act. As the Post Manual explicitly sets forth, the job of a licensed Security Officer is: "to detect, deter, and ensure guest and tenant safety, satisfaction, as well as report criminal activity damage and fire hazards". (E-4).

Licensed Security Officers are instructed in the Post Manual that: "Security presence is to be maintained at all times. Security is to manage access control to the building as well as the grounds." (E-4). The licensed Security Officers monitor cameras, admit guests and visitors, and conduct nightly tours of the building. (P-7, E-7).

The record evidence establishes that the licensed Security Officers are employed to protect the safety of the residents. To see this, one needs to look no further than The Plex website, where a complaint logged by a resident stated: "Security needs to do their job and provide tenants with a safe environment. The number of people partying on the roof is clearly a threat to our safety as well as our sanity. Don't forget we are paying extra rent for the security." (E-3). Similarly, any question of their role as security guards was eliminated by the admission of Sebastian Ortiz ("Ortiz"), a licensed Security Officer at Maximum, who admitted "were basically to do as security guards is basically to monitor and observe our surroundings". (Tr. 252). Ortiz also acknowledged that the licensed Security Officers make sure nothing is broken or destroyed and protect the residents of The Plex. (Tr. 252).

Security Officers make two nightly rounds to ensure the building is locked and secured and that residents are compliant with the rules of the building. (Tr. 256). As detailed in the Post Manual, every day, Security Officers are instructed to perform a round at 11:00 P.M and a second round thereafter at a different time each night. (E-4). Security Officers operate the Detex System, which requires the utilization of a wand to make sure the twenty-plus check points are covered to ensure the building is “all clear” - a term utilized by the Security Officers. (E-7). The licensed Security Officers are required to walk on each floor to ensure there are no security breaches, and to confirm with the wand, every hour, that security is free of any infractions. (E-6).

The Regional Director conceded that completing rounds is a guard function, but trivialized the two rounds conducted daily by the licensed Security Officers, noting they are not intended to take longer than twenty minutes and are instructed to leave a note with a phone number so residents could get in touch. However, these factors do not belie that the licensed Security Officers are performing a guard function. The amount of time prescribed is irrelevant, as it is sufficient for the licensed Security Officers to ensure the residents’ safety and compliance with the rules. Additionally, by not being away from the lobby or out of touch with residents for an extended period of time, the licensed Security Officers are stationed at the security desk, where they monitor cameras which record a number of areas around the building, furthering their security function.

The duties and responsibilities of the licensed Security Officers clearly establish their employment as statutory guards, but the Regional Director chose to ignore these facts, while heavily relying on a single occasion when a Security Officer assisted with snow removal. There is no mention of snow removal in the Post Manual, as it is not within the licensed Security Officers job duties and responsibilities. Maximum has been servicing The Plex for over two years, but the Regional Director selected one isolated incident to justify the determination that the licensed

Security Officers primarily perform tenant services, in spite of their duties and responsibilities proving otherwise.

The Regional Director notes that the licensed Security Officers are responsible for accepting packages for the residents, but as Maurice Germain (“Germain”), a licensed Security Officer, testified: the licensed Security Officers were trained in identifying suspicious packages as part of the training required to obtain a New York State security guard license. (Tr. 177). Furthermore, the license Security Officers do not deliver the packages to the residents, they are stored.

Additionally, though the Regional Director stressed cleanup work done by the licensed Security Officers, Germain testified that the cleanup work typically consisted of voluntarily assisting for two minutes. (Tr. 185-186). Notably, the Post Manual does not mention cleaning as part of the licensed Security Officers’ duties and responsibilities. (E4).

Accordingly, the overwhelming majority of the licensed Security Officers’ duties and responsibilities were those of guards. The occasional performance of a duty outside of security does not destroy their statutory guard status. See A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983). The Regional Director sought to distinguish this matter from A.W. Schlesinger Geriatric Center on the basis that the licensed Security Officers were supposedly hired to replace a concierge service. However, there is no evidence in the record supporting this contention. Furthermore, it is clear from the Service Agreement that the New York State licensed Security Officers were hired to be employed as guards within the meaning of Section 9(b)(3) of the Act.

The Regional Director, in determining that the employees primarily perform tenant services, chose to ignore and overlook substantial, documented, and admitted, evidence indicating

that the licensed Security Officers' duties and responsibilities were within the definition of guards within the meaning of Section 9(b)(3) of the Act, while simultaneously highlighting irrelevant, mistaken, and unsubstantiated evidence to support the erroneous determination.

C. Contrary to the Regional Director's assertion, the record shows that the licensed Security Officers enforce rules against other persons.

The Regional Director determined that there is no evidence that licensed Security Officers enforce rules against other persons, the record, however, clearly proves otherwise. The Post Manual instructs the licensed Security Officers in enforcing rules regarding: the community lounge area; loitering; smoking; building access; deliveries; dogs; and the roof area. (E4-E5). While conducting their nightly rounds, the licensed Security Officers ensure that the rules are being complied with. (Tr. 256).

The record testimony supports this important security function. For instance, Ortiz admitted that the licensed Security Officers are responsible for enforcing the rules, testifying that on several occasions he warned a resident about playing piano in the common area after 11:00 P.M., in violation of The Plex rules. (Tr. 263). Ortiz put a stop to it and when challenged by the resident he explained that this was part of his job. (Tr. 263-64). On another occasion, Ortiz chased an intruder and escorted him out of the building. (Tr. 275).

Additionally, residents expect the licensed Security Officers to enforce the rules. This is evident from a complaint logged on the Plex Website, where a resident said that the rule pertaining to late night use of the roof area was not being well policed and criticized security for not doing its job of providing tenants with a safe environment. (E-3).

These admissions were conveniently omitted from the Regional Director's decision. Accordingly, the Regional Director erred in determining that the licensed Security Officers do not enforce rules against other persons. By itself, this evidence proving that the licensed Security Officers do enforce rules is persuasive to confirm their employment as guards within the meaning of Section 9(b)(3) of the Act.

CONCLUSION

The substantial record evidence, including the Service Agreement, the Post Manual, the licensed Security Officer's duties and responsibilities and their own admissions, proves the licensed Security Officers are employed as guards within the meaning of Section 9(b)(3) of the Act. The Regional Director's Decision and Direction of Election to the contrary ignored the uncontroverted facts and therefore should be reviewed.

POINT 2

THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION WAS BASED ON A SUBSTANTIAL QUESTION OF LAW WITH AN ABSENCE OF BOARD PRECEDENT.

In her Decision and Direction of Election, the Regional Director stated:

I note that these employees are licensed as security guards by New York State and complete training with third parties to maintain their licenses; I do not find this fact dispositive absent a showing they perform a security function under the Act.

The Regional Director cited no Board precedent or basis for determining that the employees are not statutory guards in spite of them being certified as security guards by the New York State Department of State Division of Licensing Services and deemed by New York State and its qualifying agencies as qualified to work as security officers. (E-2). Furthermore, pursuant to the Service Agreement, certification by the State of New York as a security guard is a necessary requirement for employment as a Security Officer at The Plex. (E-2). Nevertheless, the Regional Director held that the licensed Security Officers are not employed as guards within the meaning of Section 9(b)(3) of the Act.

The absence of Board precedent supporting the Regional Director's holding, which is in contradiction to determinations made by the State of New York and its qualifying agencies, is particularly egregious considering the added qualifier: "absent a showing they perform a security function under the Act." As detailed at length above, and as made clear by substantial evidence in the record including the Service Agreement, the Post Manual and admissions made by the Security Officers, the licensed Security Officers perform numerous security functions including, but not limited to; patrolling the premises; controlling access to the property; enforcing the rules; and ensuring residents' safety.

Additionally, cases cited by the Regional Director in support of the conclusion that the licensed Security Officers are not guards within the meaning of Section 9(b)(3) of the Act, do not suggest or imply that New York State licensed Security Officers are not statutory guards. The Regional Director considered the duties and responsibilities of the licensed Security Officers as similar to those of the employees in 55 Liberty Owners Corp., however unlike the Security Officers here, those employees were not licensed or trained as security guards (nor did they make rounds, check for suspicious packages, or ask off duty employees to leave). 55 Liberty Owners Corp., 308 (1995). Likewise, in NLRB v. 67 West End Owners Corp., the employees in which the Regional Director also compares to the licensed Security Officers, there was no evidence that the employees were licensed or trained as security guards (nor did they have patrolling duties). NLRB v. 67 West End Owners Corp., 304 Fed. Appx. 911 (2d Cir. 208).

Accordingly, the Regional Director erred in concluding that the New York State licensed Security Officers are not guards within the meaning of Section 9(b)(3) of the Act without providing any Board precedent supporting this conclusion.

CONCLUSION

Wherefore, for all the foregoing reasons, the Employer submits that the instant case was inappropriately decided and respectfully requests that the Board review the Regional Director's Decision and Direction of Election.

Dated: May 8, 2017

Respectfully submitted,

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By:

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on May 8, 2017 he caused a copy of the foregoing
Employer's Request for Review to be served via electronic and regular mail upon:

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